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November 15, 2013

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E-FILED

Cynthia Brown  
Chief, Section of Administration  
Surface Transportation Board  
Office of Proceedings  
395 E Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
November 15, 2013  
Part of the Public  
Record

Re: Finance Docket No. 35755, BNSF Railway Company, CBEC Railway Inc.,  
Iowa Interstate Railroad, Ltd., and Union Pacific Railroad Company -- Joint  
Relocation Project Exemption -- In Council Bluffs, IA

Dear Ms. Brown:

Attached for filing is the Reply of BNSF Railway Company, CBEC Railway Inc.,  
Iowa Interstate Railroad, LTD., and Union Pacific Railroad Company to the  
Request for Housekeeping Stay filed by The Kansas City Southern Railway  
Company.

Sincerely,

Karl Morell  
Of Counsel

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35755

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BNSF RAILWAY COMPANY, CBEC RAILWAY INC., IOWA INTERSTATE RAILROAD,  
LTD., AND UNION PACIFIC RAILROAD COMPANY  
--JOINT RELOCATION PROJECT EXEMPTION--  
IN COUNCIL BLUFFS, IA

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REPLY TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND BARTLETT  
GRAIN COMPANY, L.P.

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Dated: November 15, 2013

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY, CBEC RAILWAY INC., IOWA INTERSTATE RAILROAD,  
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REPLY TO THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND BARTLETT  
GRAIN COMPANY, L.P.

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BNSF Railway Company (“**BNSF**”), CBEC Railway Inc. (“**CBEC**”), Iowa Interstate Railroad, Ltd. (“**IAIS**”), and Union Pacific Railroad Company (“**UP**”) (collectively “**Applicants**”) hereby reply to the Request for Housekeeping Stay (“**Stay Request**”) filed by The Kansas City Southern Railway Company (“**KCS**”) on November 6, 2013 and supported by Bartlett Grain Company, L.P. (“**Bartlett**”) by letter filed also on November 6, 2013.

**BACKGROUND**

On September 30, 2013, Applicants jointly filed a Notice of Exemption, pursuant to 49 C.F.R. § 1180.2(d)(5), for a joint relocation project in Council Bluffs, Iowa (“**Council Bluffs**”) (“**Joint Relocation Project**”). Previously, on August 7, 2013, IAIS filed a petition for exemption in Finance Docket No. 35751 for the acquisition of an approximately 0.75-mile rail line in Council Bluffs owned by BNSF (“**Line Acquisition**”). The Joint Relocation Project and the Line Acquisition are intended to facilitate the reconstruction of the interchange of I-80 and I-29 in Council Bluffs as part of the Council Bluffs Interstate System Improvements Project (the “**CBIS Project**”).

The Stay Request addresses the October 17, 2013 Supplement filed by IAIS and the October 17, 2013 letter filing of Iowa Department of Transportation (“**IDOT**”) in FD 35751. The Stay Request also seeks a housekeeping stay of the Joint Relocation Project in FD 35755. By decision served November 8, 2013, Chairman Elliott granted the housekeeping stay and requested replies to the Stay Request by November 15, 2013.

### **REPLY**

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is the movant’s obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974).

KCS cannot possibly prevail under the normal standards governing stay requests. First, KCS would not prevail on the merits. KCS does not allege, much less demonstrate, that any transaction covered by the Joint Relocation Project would disrupt service to any shipper in Council Bluffs. Rather, KCS makes the illogical argument that the Board can only find no disruption of service to shippers in this proceeding after the Board resolves the issues in FD 35751. While the Joint Relocation Project and the Line Acquisition are both related to the CBIS Project, they are separate transactions. Even if the Line Acquisition were to result in a disruption

of service, which Applicants strongly dispute, it does not follow that the transactions covered by the Joint Relocation Project would disrupt service.

Second, KCS and Bartlett have not and cannot demonstrate that they would suffer irreparable harm absent a stay. In FD 35751, KCS and Bartlett are seeking a commitment from IAIS not to raise its rates in the future and to charge unit train rates even if Bartlett ships only a single car. Alternatively, KCS asks the Board to impose such conditions in approving the Line Acquisition. Such conditions, however, have never been imposed by the Board or its predecessor in 30 years of rail line sales. KCS and Bartlett are not seeking to end any discrimination against Bartlett traffic. Rather, they are seeking to have IAIS discriminate in favor of Bartlett traffic.

Third, Applicants, IDOT, and the citizens of Council Bluffs will be harmed from a stay by jeopardizing or substantially delaying the CBIS Project.

Fourth, the public interest does not support a stay. The reconstruction of the majority of the Council Bluffs Interstate System, which the Joint Relocation Project is intended to facilitate, is in the public interest and a stay only jeopardizes that Project. KCS and Bartlett are jeopardizing the CBIS Project for their own personal and selfish gains.

Finally, the Stay Request itself demonstrates that a stay of the Joint Relocation Project is unnecessary and a futile gesture. KCS correctly notes that Board “approvals or authorizations are permissive and not mandatory.” Stay Request at 10. KCS also notes that “the relocation elements cannot be accomplished, at least not as currently proposed, without the line sale.” Stay Request at 12. As KCS readily concedes, a stay is totally unnecessary and serves no useful purpose. The transactions covered by the Joint Relocation Project will not be consummated unless and until the Line Acquisition is authorized by the Board. In turn, the CBIS Project, as

currently structured, will not go forward until both the Joint Relocation Project and the Line Acquisition are approved by the Board.

In summary, Applicants respectfully urge the Board to lift the housekeeping stay and allow the Notice of Exemption in this proceeding to become effective.

Respectfully submitted,



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Dated: November 15, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of November 2013, a copy of the foregoing Reply was served by first class mail on all parties of record.

  
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Karl Morell